In The

Supreme Court of the United States

October Term, 1978

No. 78-1682

JOHN FORAN,

Petitioner,

vs.

HON. PAUL METZ, as Superintendent of Great Meadow Correctional Facility,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully petitions for a writ of certiorari for leave to appeal from the judgment of the United States Court of Appeals for the Second Circuit, entered on the 6th day of April, 1979, affirming the judgment entered in the United States District Court for the Southern District (Cannella, J.), entered the 9th day of January, 1979, dismissing petitioner's petition for a writ of habeas corpus to release him from custody pursuant to a judgment of conviction entered on the 18th day of February, 1975 in New York County Supreme Court, sentencing him to a term of seven to twenty-one years, affirmed by the Appellate Division, First Department without opinion and leave having been denied to appeal to the New York Court of Appeals.

OPINIONS AND JUDGMENT BELOW

The judgment of the United States Court of Appeals for the Second Circuit entered April 6th, 1979, affirming the judgment dismissing the petition for a writ of habeas corpus was affirmed on the opinion below of the Hon. John M. Cannella, 78 Civ. 81 (S.D.N.Y. Jan. 9, 1979), to the extent that it found no violation of the Interstate Agreement on Detainers (Appendix, 1a).

JURISDICTION

The jurisdiction of this Court is invoked for a petition for a writ of certiorari to review the affirmance of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. §1254.

QUESTION PRESENTED

1. Does the failure of State authorities to bring a federal prisoner to trial within the limitations periods prescribed in the Interstate Detainer Act deprive the prisoner of his constitutional rights secured by the speedy trial safeguards of the Sixth Amendment and due process of law safeguard of the Fourteenth Amendment?

2. Do the limitations periods prescribed in the Interstate Detainer Act, for bringing a prisoner from another jurisdiction to trial, take into account ordinary cause for delay of the trial, such as motion practice, and thereby prohibit extensions of the limitations periods prescribed for such ordinary cause?

STATUTE INVOLVED

Section 580.20, New York Criminal Procedure Law provides:

"ARTICLE III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. . . ."

"ARTICLE IV

(c) In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

STATEMENT OF THE CASE

On the 30th day of March, 1973, the Grand Jury of New York County Supreme Court indicted petitioner John Foran and co-defendants Charles Cumella and James Mooney, for attempted murder and assault in the first degree. The cause for the accusation was the shooting of Monroe Robinson that took place on the 21st day of September, 1972, at 5:00 A.M. on Lenox Avenue, near 116th Street. Robinson was accompanied by Rose Ann Sessoms at the time. Trial commenced October 17, 1974. Petitioner was tried jointly with co-defendants Cumella and Mooney. Robinson, although shot several times, survived the attack.

The suspects, although arrested on September 21, 1972, were not indicted until March 30, 1973. All three were freed on bail. However, Cumella and petitioner had pending indictments against them on unconnected federal charges and were brought to trial and convicted. On the 12th day of September, 1973, they were sentenced by the United States District Court for the Eastern District of New York. In September of 1973, counsel for petitioner requested Assistant District Attorney Michael Toolan, to obtain custody of petitioner from the Superintendent of Lewisburg Correctional Facility pursuant to the provisions of the Interstate Detainer Agreement in order to face the pending State charges.

However, it was not until the 20th day of March, 1974, that petitioner was produced at the Manhattan House of Detention, pursuant to a warrant issued by Supreme Court Justice Joseph A. Martinis lodged as a detainer for petitioner on the 24th day of January, 1974 with the warden of the federal penitentiary in Lewisburg, where petitioner was then serving his federal sentence.

Petitioner moved the court on the 13th day of June, 1974, returnable the 24th day of June, to dismiss the indictment for denial of a speedy trial.

On July 8, 1974, Justice Gerald P. Cullen, made light of petitioner's right to a speedy trial:

> "What you call a speedy trial, I'd like to know. You can't spell it out in black and white. There is no such thing. Speedy trial is when everyone is ready and prepared to go. That kind of situation happens about once every eight months. No. 1, everybody has to be here, including the defendants. We have to have a Part, the District Attorney's witnesses and everything else. Nobody is ready to die but they all do sooner or later, so what's the sense of talking about speedy."

Petitioner not only moved to dismiss for denial of a speedy trial, but objected to any further adjournment. Although the case was put over for one week, to July 15, 1974, Assistant District Attorney Irom made the announcement that Assistant District Attorney Toolan, in charge of the prosecution, was going on vacation "starting Thursday. He won't be here next Monday anyway." The following colloquy ensued:

> "Mr. Green: That is unfortunate, but I don't think that should be any legal reason for an adjournment.
>
> Mr. Irom: I'm not saying it is. I'm just saying he won't be here.
>
> Mr. Green: I don't know how many Assistant D.A.'s there are in N.Y. County, but there are many others who can try the case.
>
> The Court: I suppose there are counselor, but you know as well as I do that when a lawyer will come in and say 'I'm not familiar with the case, I'll have to check it out' and all that stuff. So you are back where you started from."

The court delayed the case in order to decide petitioner's motion for a speedy trial. On July 22, 1977, the case was again adjourned over objection of petitioner, with Assistant District Attorney Toolan still away on vacation, to afford the court additional time to decide the motion to dismiss the indictment for denial of a speedy trial. The motion was denied.

Petitioner then moved the court, in writing, returnable July 26, 1974, to dismiss the case for delay in excess of 120 days from the time he was produced pursuant to the Interstate Detainer Agreement. Petitioner also objected to any further delay for any reason indicating his readiness to proceed to trial. The court put the case over, *sua sponte,* over objection on grounds the Assistant District Attorney was still on vacation.

On the 1st day of August, 1974, the office of the District Attorney continued to treat lightly petitoner's motion to dismiss the indictment for failure to bring him to trial in the required 120 days from his arrival in the jurisdiction.

Justice Melia, to whom the case was transferred, reminded Assistant District Attorney Littman, substituting for Toolan still on vacation, of the serious question raised:

> "The Court: Mr. Littman, we have a question of law here whether or not this Court has any jurisdiction whatsoever to even grant an adjournment. Now, you say you're not familiar with the case, and I can understand that, but as far as the law is concerned, the District Attorney is responsible for coming in here with some answers to this question."

When pressed, Assistant District Attorney Littman gave the following explanation for the delay:

> "Mr. Littman: I am aware of the agreement on detainers. My understanding is, if a good cause is shown, there is always reason for the matter to be tried after 120 days.
>
> I would suggest to this Court, and I can only suggest it in the broadest terms because as I said before, I'm not intimately familiar with the facts, that (a) good cause shown may be shown by the fact there are approximately 400 defendants incarcerated—400 outstanding homicide cases to be tried in Manhattan, of which—
>
> The Court: Mr. Littman—
>
> Mr. Littman: Your Honor, if I could just—
>
> The Court: Mr. Littman, no, I'm not letting you finish. I don't want, on a serious matter like this, for someone to step in the courtroom and speak like that. This is a very serious legal question. The least the District Attorney owes to the Court is a responsible affidavit, and, in an instance of this kind, a memorandum of law, which should be here now."

Over objection of petitioner, the case was further adjourned to August 8th. Thus, instead of commencing the trial, the court delayed the case to afford the District Attorney opportunity to submit a memorandum of law to try to justify delay in the past, disregarding delay at that very time.

On August 5, 1974, the case again appeared on the calendar. Assistant District Attorney Toolan was back by then from his vacation. Petitioner made it clear that he was ready to proceed to trial at that time. Assistant District Attorney Toolan made the following representation:

> "Your Honor, as I stated in a prior affidavit with Justice Culkin on the motion which I

answered before leaving on vacation, the People stated that they would be ready to proceed with the trial of this action in the August term, and the Court ordered at that time that the case be tried during the August term."

Counsel for petitioner made his position clear:

"Mr. Green: The first motion was not based on the interstate agreement on detainers. It was just a motion addressed to the fact the People did not prosecute. That was returnable originally June 24th. Now, the 120 days then expired July 16th. When that ran, then I made my second motion. . . ."

The court then affirmed that unless the indictment is dismissed for violation of the Sixth Amendment right to a speedy trial or denial of the Interstate Detainer Agreement, the case would proceed to trial on August 8th:

"The Court: Well, I adjourned it until the 8th; that is, the two motions. Now I'll give Mr. Toolan—it's because Mr. Toolan was on vacation last week that I put it over to the 8th, so I'll leave the 8th stand with the understanding that if I rule against the defense on that day, both sides proceed right to trial."

On August 8, 1974, petitioner pressed his motion to dismiss the indictment:

"Mr. Green: If your Honor, pleases, in behalf of defendant John Foran, as the Court well knows, this is a motion to dismiss the indictment, with prejudice, pursuant to the Interstate Agreement on Detainers.

A short history of this case, Judge. The defendants were arrested in September, 1972. In November they waived the case to the grand jury. Apparently the case was presented twice to the grand jury and an indictment was handed up in April of 1973. The defendant Foran was sentenced in September of 1973 to seven years in Federal Penitentiary. One hundred twenty days after that the sentence was reduced by one year, which has nothing to do with this case. I notified Mr. Toolan in September 1973 that the defendants were, in fact, incarcerated in the federal prison in Lewisburg, that I wished they be returned and they wanted to proceed to trial.

Mr. Toolan in his affidavit opposing a previous motion to dismiss for lack of prosecution states that on October 2nd he informed the Court, in open Court, that he would produce the defendants back to this jurisdiction pursuant to the Interstate Agreement on Detainers. They were not produced, and as the Court well knows, it was not incumbent upon the defendants to produce themselves but rather upon the prosecution to have them produced. They were not produced until March of 1974. I believe the exact date, Judge, was March 19, 1974.

Now, since that time, Judge, the defendant Foran has been ready on each and every occasion. He has never requested an adjournment. His motions had been made in Motion Part 30 prior to his sentence in the federal court.

It is my position, Judge, that this indictment should be dismissed, with prejudice, due to the

failure of the People to try this defendant within 120 days.

Now, Mr. Toolan, in his affidavit in opposition, cites one reason for the adjournment, that he was engaged starting March 21st before another judge of this court. I don't doubt this as a fact, Judge. However, when Mr. Toolan produced these defendants for trial in March, it could mean only one thing, that the People of the State of New York were ready to try them, be it Mr. Toolan or be it one of the other hundred or more assistants in the prosecutor's office. I don't believe, Judge, the fact that Mr. Toolan himself was engaged is a legal excuse for any delay caused in this case.

As I said, the defendants had been arrested in September, 1972, and certainly if Mr. Toolan could not proceed, it was incumbent upon him to give this file to another assistant district attorney, particularly since he had told the Court the October before that he would produce these prisoners, and producing them had to mean only one thing legally, Judge, that when they were produced, he was ready to try them.

Now, Mr. Toolan cites another reason, vacation. I returned from my vacation to try this case. I don't believe a vacation by an assistant district attorney is a reason, when the case will be two years old in September, nor are vacations by any officers of the Police Department any reason, particularly, again, Judge, he talked about vacations in July when the defendants were produced before this Court, before this jurisdiction, the March prior to that.

> I respectfully submit to this Court, Judge, that the statute is specific, that they must be tried within the 120 days unless good cause is shown, and I would respectfully submit to this Court that Mr. Toolan or the D.A.'s office has not shown good cause.
>
> I would like to point out, Judge, that on each time a motion was made to dismiss, the People were never ready. Every application, every adjournment in this case since the return of the defendants regarding my client John Foran has been at the application of the People."

When the court raised the issue that defendant Cumella had brought on a motion to inspect the Grand Jury minutes and to dismiss the indictment, or in the alternative, for a bill of particulars, it was developed that petitioner had made such motion, but prior to his federal conviction. Moreover, it was further developed that said motion could have been resolved in a matter of days, and that, indeed, the 120 day period to bring a defendant returned to the jurisdiction for trial, contemplates that the usual motions will be made during that period since the presumption is that the prosecution is ready for trial when it produces them.

Assistant District Attorney Toolan replied:

> "Now I listed in my answering affidavit to Mr. Green's papers to show only the chronological history that I was on vacation in July. Certain adjournments occurred in July on the motions and I wasn't here. In closing my affidavit, the Court will note I never cited in my application I was on vacation as a good-cause basis. I did cite for the Court's benefit the fact that certain key witnesses were unavailable, through no fault of the People, and I was on trial

for approximately 30 days during the 120 day period, and . 'so I'd like to point out to the Court that in May of this year the Administrative Judge of this Court, Justice Ross, conferenced all old homicide cases. Each assistant was almost required to be in court on a daily basis in Part 36 on the Conference Calendar to aid and assist in a disposition of the tremendous backlog of prison-homicide cases, and this deponent in these papers was in court almost on a daily basis in that instance and I cite that as certainly good cause."

The court denied the motion, ruling as follows:

"Now, one ground presented by the District Attorney was the fact he was on trial for the period set forth. Certainly that is good cause.

Counsel for the defense at that point would have the District Attorney's office immediately transfer that case to another assistant to try. Well, there is no such requirement. Indeed, that is most unreasonable. . . . That was a necessary and reasonable postponement for that reason.

Now there was an omnibus motion pending for part of the time. That is as to one defendant. Mr. Green says, 'Well, you can't hold that against me and my client.' If that be a reasonable argument, it would then flow that Mr. Green is saying the District Attorney then would have to go to trial as against the other two, and then later, after the omnibus motion was decided, go to trial with the third. Well, that's an unnecessary waste of court time which is a luxury that we cannot indulge ourselves in today with the crowded calendar situation that we have.

There was a motion pending. Till that motion is decided, within a reasonable time, and certainly the time indicated is not unreasonable, a motion made dated May 3rd and decided May 30th, '74, I think that was a necessary and reasonable continuance under the circumstances of the calendar conditions in this court, in this county.

Then there is something to do with availability of witnesses and the District Attorney's vacation. Mr. Green, in effect, says the District Attorney isn't entitled to a vacation. That's what it adds up to. If the District Attorney could not go on vacation because he had a case to try he would never get one because he always has a case to try.

Under all of the facts and circumstances, it seems to me that this statute has not been violated and that the modification necessary or reasonable for a continuance prevails.

Accordingly, the motion to dismiss on that ground is denied. The People answered that, outside of that, they're ready for trial. The motion is denied."

However, the court still did not afford petitioner a trial until October 17, 1974, twenty-five months after his arrest for the crime, thirteen months after his demand to be produced for trial pursuant to the Interstate Detainer Agreement, seven months after his production within the jurisdiction for trial, and seventy days after denying his motion to dismiss the indictment for failure to bring him to trial within one hundred twenty days.

REASON FOR GRANTING THE WRIT

Petitioner's Fourteenth Amendment rights to due process of law were denied by failing to bring him to trial within one hundred eighty days of the lodging of a detainer with the warden of the federal penitentiary in which he was serving a federal sentence and one hundred twenty days of his arrival within State jurisdiction.

On the 21st day of September 1972, the day of the assault, petitioner and co-defendants, Cumella and Mooney, were arrested for attempted murder. Not until March of 1973, did a Grand Jury finally hand down an indictment, charging them with the crime. Thereafter, petitioner and Cumella were convicted upon a plea of guilty in the United States District Court for the Eastern District of New York, for the crime of extortion. Petitioner was sentenced to a seven year term, later reduced to six years, and sent to Lewisburg Correctional Facility for execution of his sentence.

In September of 1973, pursuant to the Interstate Detainer Agreement, codified in Section 580.20, New York Criminal Procedure Law, petitioner's attorney demanded of Assistant District Attorney Michael Toolan that petitioner be returned to the jurisdiction to face the pending attempted murder indictment. Toolan immediately commenced proceedings to return petitioner for trial. On the 24th day of January, 1974, a detainer was lodged with the warden of the federal penitentiary at Lewisburg. On March 20, 1974, petitioner was produced in New York City for such purpose. It is undisputed that petitioner was not brought to trial within the required one hundred eighty days of the filing of the detainer on January 24, 1974. On appeal to the Appellate Division, First Department, the State argued that the one hundred eighty day period did not commence to run at any time because counsel for petitioner gave the District Attorney oral notice, rather than written notice to produce petitioner for trial. Short shift can be made for such frivolous

argument. The fact is that Assistant District Attorney Toolan did not object to oral notice and proceeded to comply with the provisions of the "Interstate Agreement" by immediately taking steps to return petitioner and Cumella for trial, lodging a detainer on the 24th day of January, 1974 with the warden of Lewisburg penitentiary. (At this time, co-defendant Mooney was still out on bail.)

Assistant District Attorney Toolan made no objection to the oral notice afforded him, but complied with the provisions of the Interstate Detainer Agreement to the extent of lodging a detainer with federal prison authorities, thereby starting the running of the applicable Statute of Limitations. Therefore, Assistant District Attorney Toomey waived written notice by accepting oral notice and acting on it. Nor does he make any showing how oral notice prejudiced the State.

The next issue is whether the State made any application in "open court" for an extension of the respective required one hundred eighty day and one hundred twenty day periods required for trial, for "good cause" or otherwise. The record is clear that no such extension was requested. Instead, on the arrival of petitioner on March 20, 1974 within the jurisdiction, Mr. Toolan went to trial on another case, without making any application to afford petitioner opportunity to be heard. In *United States v. Ford,* 550 F.2d 732 (2nd Cir. 1977), the court of appeals wrote, "We have previously emphasized outside of the context of the Detainers Act, the importance of granting the defendant an opportunity to be heard before granting an extended criminal trial continuance." The *Ford* court also held that calendar congestion is no excuse for the deprivation of a speedy trial, within the framework of the Interstate Detainer Agreement.

Thus, it is not necessary to go beyond the one hundred eighty day requirement. The burden was on the prosecution to bring petitioner to trial within such period. The prosecution

failed to do so and failed to make an open court application for an extension on a showing of reasonable grounds for delay. Indeed, had petitioner been brought to trial promptly upon his arrival in New York, the one hundred eighty day requirement would probably have been met. It is submitted that the one hundred eighty day requirement is for the purpose of affording a prosecutor opportunity to produce a prisoner and the longer it takes to produce him, the shorter the time he has to bring him to trial once he has been returned to the jurisdiction. Assuming the one hundred eighty days began to run on January 24, 1974 when the detainer was lodged, the State lost jurisdiction to bring petitioner to trial when it failed to do so by July 24, 1974.

When a prisoner has been immediately returned to the jurisdiction for trial, the outside time for bringing him to trial is one hundred twenty days, as set forth in Section 580.20, *supra:*

> "(c) In respect to any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

It is strongly submitted that any interpretation afforded Section 580.20 to afford the prosecution one hundred eighty plus one hundred twenty days to bring a prisoner to trial is clearly fallacious. It is submitted that subdivision (c) is only applicable where a prisoner has been produced within sixty days of his demand. It serves to shorten the period of time the State has to bring him to trial, not to lengthen it. The purpose of the Interstate Detainer Agreement is to drastically abbreviate the period of time afforded the State to bring a prisoner to trial, in order not to interfere with rehabilitation programs, parole programs and the like, on the sentence he is already serving, and to reduce tension by the prisoner in order to keep him in a mental frame for such rehabilitation programs.

The State further violated the provisions of the Interstate Detainer Agreement, since petitioner was not brought to trial until seven months from his arrival within the jurisdiction.

Prior to his trial and conviction in federal court, in 1973 petitioner had moved to inspect the Grand Jury minutes and to dismiss the indictment and in the alternative for discovery and a bill of particulars in New York County Supreme Court, which motion was promptly disposed of. Subsequent to his return to the jurisdiction to face the pending State charges, the only motions he made was to suppress evidence and to dismiss the indictment for denial of a speedy trial. To urge that a motion to dismiss an indictment for denial of a speedy trial, justifies delaying a trial that at all times the prisoner has demanded is bootstrap reasoning. Thus, petitioner was not the cause of any delay, by any motion practice initiated by him. Nor does a motion to suppress evidence stay the 120 day limitation period, since the purpose of affording the State 120 days to bring a defendant to trial is to afford opportunity for such motion. Indeed, a suppression hearing properly occurs at the beginning of trial. Moreover, it is presumed that the State is ready to try a sentenced prisoner when it demands his return and produces him within the jurisdiction. The reason for the one hundred eighty day and one hundred twenty day allowable delays in commencing trial is to afford the parties opportunity for reasonable motion practice. There is nothing within the statutory provisions that excludes the running of time for the period it takes to dispose of motions.

In addition, the State has urged that Cumella caused delay by making the identical motion that has been made by petitioner a year before to inspect the Grand Jury minutes and dismiss the indictment or in the alternative for discovery and a bill of particulars. Since this motion had already been decided on petitioner's application, no more than a week was reasonable to dispose of it on Cumella's application, assuming *arguendo* that the making of such motion creates an excludable event.

Petitioner has quoted extensively from the minutes of adjournments following his return to the jurisdiction, that refutes the argument of the State that succeeded in the appellate division and the district court and court of appeals that petitioner was the cause for the delay. At all times, petitioner was ready to proceed to trial. It is true that Mooney, who was free on bail, was not pressing for a trial and his attorney even tried to delay through the guise of other engagements. However, Mooney, on bail, did not have the right to impair petitioner's Interstate Detainer Act rights. There was no valid cause for the court to have delayed the case beyond the hundred twenty day period. Up to the running of the one hundred twenty day period, the defendants were always ready, while the prosecutor was not. The record clearly shows that on August 8, 1974, the court denied petitioner's motion to dismiss the indictment for failure to afford him a trial within one hundred twenty days, and then delayed the trial another seventy days to October 17, 1974. The record is also replete with the cause for delay, to wit, Mr. Toolan's other obligations, including a thirty day trial in which he participated, appearances in various calendar clearing parts and vacation. Such grounds are not sufficient cause for delay. *United States v. Ford,* 550 F.2d 732 (2nd Cir. 1977).

Initially, the district court questioned whether federal habeas corpus is an available remedy for a State prisoner raising the issue of the violation of his rights under the Interstate Detainer Act, pointing to case law in the Second Circuit, holding that such issue is not available for a federal prisoner on a petition brought pursuant to 28 U.S.C. §2255, the federal post conviction relief statute. However, the reason for its nonavailability on a Section 2255 motion, is that the latter is only available for matters not appearing upon the record. A violation of the Interstate Detainer Act appears on the record, and therefore, must be raised on direct appeal. On a federal habeas corpus petition brought pursuant to 28 U.S.C. §2254, the prisoner is confined to the raising of issues that appear on the record and that were raised and rejected by State court.

Since an Interstate Detainer Agreement issue appears on the record and raises a constitutional issue, it is cognizable on federal habeas corpus. In *Walker v. King,* 448 F. Supp. 580 (S.D.N.Y. 1978), the Southern District faced this question and held that a federal court may properly entertain a State prisoner's claim for violation of the Interstate Detainer Agreement in a federal habeas corpus proceeding. In that case, like the one at bar, the State prisoner had been serving a federal sentence when returned to State court to face State criminal charges. The federal habeas corpus court held that the Interstate Detainer Agreement must be strictly construed. The State must respond to a federal prisoner's demand to be tried within 180 days. The court held that even returning a State prisoner, subsequent to his plea of guilty, but prior to pronouncement of sentence, to federal custody, violates his rights under the Act, and calls for his release on federal habeas corpus. The court reasoned that the purpose of the Act was to minimize interference with rehabilitation programs and the tension accompanying the uncertainty of pending charges, and therefore, its provisions must be strictly construed.

The district court conceded that petitioner was not brought to trial within the required 120 day limitation period from the time he was produced within State court jurisdiction and calculates that the delay was a full 92 days beyond what is permitted by the Act. This 92 day delay must be read in conjunction with the more than two year delay in bringing petitioner to trial for this serious crime from the date of his arrest on September 21, 1972, which combine to spell out a clear Sixth Amendment violation of his right to a speedy trial coupled with his due process of law rights under the Interstate Detainer Act.

The court below rationalized justification for the illegal delay, by proceeding to exclude certain periods, without justification. Thus, a co-defendant made a discovery motion, which took twenty eight days to decide, which the court

excluded from the one hundred twenty day requirement. However, petitioner had made an identical discovery motion at the preliminary stages of this indictment and before his federal conviction. The State has made no showing why it did not immediately consent to make the same discovery to the co-defendant as had been ordered for petitioner. The State is certainly not privileged to engage in unnecessary litigation with a co-defendant and then exclude that time from the one hundred twenty day requirement. Nor did the habeas corpus court properly exclude the time to adjudicate petitioner's motions to dismiss the indictment for denial of a speedy trial and violation of the Interstate Detainer Agreement. Indeed, what the court clearly overlooked was that the State court was in flagrant error in denying the two motions made to dismiss the indictment for violation of the Interstate Detainer Agreement, or at the very least, to order an immediate trial.

The Interstate Detainer Agreement allows for a one hundred twenty day delay in bringing a prisoner to trial — rather than requiring an immediate trial — to allow for motion practice, to allow for limited calendar congestion, to allow for possible vacations of prosecutorial personnel and the like. The court below, in justifying the delay based upon such ordinary incidents, overlooked the very fact that by allowing the prosecutor one hundred twenty days to start trial is sufficient to allow for ordinary delay for motion practice and the like. Overcrowded court dockets and understaffed prosecutors has never been considered an impressive basis for delaying a trial. *Strunk v. United States,* 412 U.S. 434 (1973). Therefore, when a statute fixes a time for bringing a defendant to trial, it is presumed that a prosecutor who delays up to the limit of the full time allotment to commence the trial has done so because of such ordinary type factors. Those very same type incidents cannot be drawn upon a second time to justify delay beyond the statutory limitation period. *United States v. Favaloro,* 493 F.2d 623 (2nd Cir. 1974) Indeed, the time limit is in the nature of a Statute of Limitations, that is not subject to revival, absent the

most extraordinary of circumstances. The Supreme Court in *United States v. Mauro,* 98 U.S. 1834 (1978) used language that made it abundantly clear that the time period fixed in the Interstate Detainer enactment must be treated as a Statute of Limitations, subject to revival only under the most extraordinary of circumstances. The Court wrote:

> "We view Article IV(c) as requiring commencement of trial within 120 days whenever the receiving State initiates the disposition of charges underlying a detainer it has previously lodged against a state prisoner."

Such language does not allow for exclusion of periods of time that are ordinarily part of the trial development process. It would seem that nothing short of inaccessibility to a crucial witness or the mental incapacity of the defendant or the like could justify tolling this Statute of Limitations period.

Nor does the Interstate Detainer Agreement allow for engagements of trial counsel for a co-defendant to whittle away the rights of petitioner under the statute.

Indeed, in *Mauro,* the Supreme Court pointed out that prior to its enactment "detainers were allowed to remain lodged against prisoners for lengthy periods of time, quite often for the duration of a prisoner's sentence." It was to eliminate substantial interference with prison rehabilitation programs and to relieve prisoner anxiety that the statute was enacted. What the court below overlooked was that the statute serves rehabilitation needs of a convicted defendant against whom further additional charges are pending, not the administration of the criminal judicial process and therefore, the time limitations must be strictly construed.

CONCLUSION

This Court has never ruled whether the limitations periods prescribed in the Interstate Detainer Agreement are true limitations periods causing abatement of the criminal actions falling within their purview and if so, whether ordinary events in the prosecution of a criminal case, such as motion practice, may properly extend the limitation period for bringing a defendant to trial.

For the foregoing reasons, petitioner prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

Robert E. Green
Attorney for Petitioner

APPENDIX

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of April one thousand nine hundred and seventy-nine.

Present:

Hon. William H. Mulligan
Hon. William H. Timbers
Hon. Ellsworth A. Van Graafeiland

Circuit Judges,

JOHN FORAN,

Appellant,

against

HON. PAUL METZ, as Superintendent of Great Meadow Correctional Facility,

Appellee.

79-2018

Judgment

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinion below of the Hon. John M. Cannella, 78 Civ. 81 (S.D.N.Y. Jan. 9, 1979), to the extent that it found no violation of the Interstate Agreement on Detainers.

s/ William H. Mulligan
William H. Mulligan

s/ William H. Timbers
William H. Timbers

s/ Ellsworth A. Van Graafeiland
Ellsworth A. Van Graafeiland

MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN FORAN,

Petitioner,

-against-

HON. PAUL METZ, as Superintendent of Great Meadow Correctional Facility,

Respondent.

78 Civ. 81
(JMC)

CANNELLA, D.J.:

Petition for a writ of habeas corpus is denied. 28 U.S.C. § 2254.

Petitioner is presently confined at Auburn Correctional Facility pursuant to a judgment of the New York County Supreme Court convicting him, after a jury trial, of attempted murder. On February 18, 1975, petitioner was sentenced to a term of imprisonment of seven to twenty-one years. The judgment of conviction was affirmed, without opinion, by the Appellate Division of the New York Supreme Court and leave to appeal to the New York Count of Appeals was denied.

Petitioner seeks a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, claiming that his state court trial was unconstitutional because:

1. The Court refused to instruct the jury that a reasonable doubt of the guilt of petitioner might result from the lack of evidence against him, in violation of the Fourteenth Amendment.

2. The use of evidence against petitioner seized from the vehicle in which he was a passenger after he was illegally detained by the police for two hours, without charges or probable cause, violated his Constitutional rights secured by the Fourth Amendment.

3. A twenty-five month delay from his arrest in bringing petitioner to trial, as well as delays in excess of 180 days and 120 days, respectively, from his demand to be brought to trial and from his production in the jurisdiction from the institution where he was serving a Federal sentence, deprived petitioner of his Constitutional right to a speedy trial secured by the Sixth Amendment.

Petition for a Writ of Habeas Corpus, at 14. The facts pertinent to each of these claims are incorporated into the discussion below.

Jury Instructions

To prevail on his claim that the jury instructions in the state court trial invalidated his conviction, petitioner must establish "not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the [petitioner] by the Fourteenth Amendment." Cupp v. Naughten, 414 U.S. 141, 146 (1973).

In this regard, the trial transcript[1] discloses that following the judge's charge, petitioner took exception to that portion of the instructions defining "reasonable doubt." Petitioner requested that the jury be instructed "that a reasonable doubt may arise from the evidence presented or from the lack of evidence presented by the Prosecution."[2] The trial court denied this request but did charge further on the definition of reasonable doubt.[3]

In United States v. Caruso, 358 F.2d 184 (2d Cir.), *cert. denied*, 385 U.S. 862 (1966), the United States Court of Appeals for the Second Circuit confronted the precise alleged error that petitioner asserts in support of his request for a writ of habeas corpus. In *Caruso*, on direct appeal from a federal conviction, the late Judge Anderson rejected the argument as follows:

> The remaining question raised on this appeal concerns the refusal of the trial judge to charge that reasonable doubt is a doubt which, in the exercise of reason, may arise not only from a consideration of all the evidence in the case but also from a lack of evidence. It would not have been error for the court to charge as requested, but this court has not made it a requirement that the trial judge, in charging on reasonable doubt, include the words "from a lack of evidence" or "from a want of evidence." United States v. Rinaldi, 301 F.2d 576, 578 (2d Cir. 1962). The charge as a whole correctly conveyed to the jury the concept of reasonable doubt.

Id. at 186-87. Similarly, in the instant case, the Court concludes that there was no error in the state court jury instructions on the concept of reasonable doubt.

Fourth Amendment

On September 21, 1972, at 5:00 a.m., the vehicle in which petitioner was a passenger was stopped by several police cars in Central Park. At the time, petitioner was seated in the front passenger's seat, with codefendant Cumella in the driver's seat, and codefendant Mooney in the rear passenger seat. The police conducted an on-the-spot search of the car, but upon discovering no evidence, brought the car and its three occupants to the local police station for further investigation. Approximately two hours later, they again searched the car and this time found a spent .38 cartridge shell on the floor just behind the driver's seat. The police then arrested the petitioner and his two companions. Sometime thereafter, they learned that the car was registered to and owned by codefendant Cumella's wife.

Pursuant to New York law, Justice Harold Birns presided over a three-day pretrial hearing on the motions by petitioner and his codefendants to suppress the cartridge shell found in the car. Movants claimed that the evidence had been seized without a warrant and without probable cause, in violation of the fourth amendment. On September 3, 1974, Justice Birns denied the motion to suppress. At the trial, before Justice Evans, the cartridge shell was received in evidence over petitioner's objection. Tr. 958-59. On appeal, petitioner renewed this objection. His brief to the Appellate Division contains nineteen pages of argument that the search of the car violated the fourth amendment. *See* Brief for Appellant Foran at 3-5, 24-40, People v. Mooney, 53 A.D.2d 1065, 385 N.Y.S.2d 694 (1st Dep't 1976).

In Stone v. Powell, 428 U.S. 465 (1976), the Supreme Court sharply curtailed federal habeas review of state convictions by stating:

> where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

Id. at 482 (footnote omitted). Petitioner argues that *Stone* does not control the outcome here because his opportunity to litigate his fourth amendment claim in the state courts "cannot be classed as 'fair' where the Court makes a finding that the police were justified in detaining suspects and their vehicle, to await the coming of daylight in order to conduct a fruitful search." Petitioner's Reply Memorandum of Law, at 5.[4] What petitioner, in effect, suggests is that under *Stone*, a federal court may characterize state court procedures as "unfair," and hence review the fourth amendment claim, where the outcome is erroneous. The Second Circuit has emphatically rejected this interpretation: "we have no authority to review the state record and grant the writ simply because we disagree with the result reached by the state courts." Gates v. Henderson, 568 F.2d 830, 840 (2d Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1038 (1978). According to the court in *Gates*, the merits of a habeas petitioner's fourth amendment claim are irrelevant if he had an opportunity to litigate it fully and fairly. The Court finds that Foran was given that opportunity. Six police officers testified at the three-day suppression hearing, the transcript of which comprises 417 pages. Petitioner renewed his objections at trial and on appeal and cannot complain that he was in any way precluded from utilizing state court procedures. Under *Stone* and *Gates*, therefore, the Court may not review the merits of petitioner's fourth amendment claims.

Speedy Trial

On September 21, 1972, petitioner was arrested, arraigned on a complaint and admitted to bail. The grand jury proceedings initially were delayed because the complaining witness was still in the hospital. The case was presented to the Grand Jury in October 1972, but no bill was filed. The case was presented to the Grand Jury again and, on March 30, 1973, petitioner and his codefendants were indicted for attempted murder and assault.

On April 11, 1973, petitioner was arraigned on the indictment and entered a plea of not guilty. On May 11, 1973, petitioner moved (1) to dismiss the indictment, (2) for a bill of particulars and other discovery, and (3) for inspection of the grand jury minutes. On June 29, 1973, the discovery aspects of petitioner's motion were granted in part by Justice Sutton and the prosecutor was given thirty days to comply. On July 9, 1973, Justice Sutton denied petitioner's motion to inspect the grand jury minutes and dismiss the indictment.

Meanwhile, petitioner was indicted on unrelated federal charges. These proceedings culminated on September 12, 1973, when petitioner was sentenced to a seven-year term of imprisonment, following his conviction on a plea of guilty to extortion in the United States District Court for the Eastern District of New York. Thereupon, petitioner was remanded to the federal correctional facility in Lewisburg, Pennsylvania, for execution of his sentence. Petition for a Writ of Habeas Corpus, at 5.

That same day, September 12, 1973, petitioner's state court case appeared on the calendar. Understandably, petitioner did not appear. The prosecutor informed the court of petitioner's federal sentence and that the People would attempt to secure petitioner's presence for trial by a writ of habeas corpus ad prosequendum. *See* N.Y. Crim. Proc. Law § 580.30 (McKinney

1971). In December 1973, federal authorities informed the state prosecutor that they would not honor the writ, allegedly because of overcrowding at the New York City federal detention facility. The prosecutor informed the state court of this situation on January 16, 1974, and indicated that he would seek production of the petitioner pursuant to the Interstate Agreement on Detainers. N.Y. Crim. Proc. Law § 580.20 (McKinney 1971); 18 U.S.C. app. (Supp. 1978).

On January 22, 1974, according to an endorsement on the state court docket sheet, Justice Martinis took the following action: "Defendant incarcerated in U.S. Penitentiary, Lewisburg, Pa. Bail is Exonerated and Bench Warrant lodged." On January 24, 1974, federal authorities received the prosecutor's request, and, on February 12, 1974, advised him that petitioner was available for return to New York. On or about March 19, 1974, state agents brought petitioner to New York City.

From March 21, 1974, to April 21, 1974, the prosecutor assigned to petitioner's case, was engaged in a murder trial on an unrelated indictment filed three months before petitioner's. *See* Respondent's Brief, at 49, People v. Mooney, 53 A.D.2d 1065, 385 N.Y.S.2d 694 (1st Dep't 1976) [hereinafter cited as "Respondent's Brief"].

According to petitioner, between March 1974 and June 1974: "Case appeared on calendar numerous times. People never ready. Defense consistently prepared to proceed." Brief for Appellant Foran, at 50, People v. Mooney, 53 A.D.2d 1065, 385 N.Y.S.2d 694 (1st Dep't 1976). On May 2, 1974, a new attorney was substituted for one of petitioner's codefendants. On May 3, 1974, this attorney made certain discovery motions which were denied on May 30, 1974. On June 14, 1974, and June 24, 1974, the prosecutor was granted adjournments because of the unavailability of police witnessess who were on vacation. Respondent's Brief, at 50.

On June 13, 1974, petitioner filed a motion, returnable June 24, 1974, seeking to dismiss the indictment for denial of a speedy trial, presumably pursuant to state law. Petitioner's Memorandum of Law, at 6 (filed Jan. 9, 1978); *see* N.Y. Crim. Proc. Law §30.20 (McKinney Supp. 1978-79). On the return date, one of the petitioner's codefendants was granted leave to join in the motion and the prosecutor was granted an adjournment until July 8, 1974 to serve responding papers. Transcript of Proceedings, at 2 People v. Foran, No. 6387/72 (N.Y. County Sup. Ct. June 24, 1974) (Culkin, J.). On July 8, 1974, the prosecutor filed his response to petitioner's motion and the court adjourned the motion, over petitioner's objection, to July 15, 1974, for decision. Transcript of Proceedings, at 2, 7, People v. Foran, No. 6387/72 (N.Y. County Sup. Ct. July 8, 1974) (Culkin, J.). On July 17, 1974, Justice Culkin denied the motion to dismiss with leave to renew if petitioner was not brought to trial by September 1974. Justice Culkin held that petitioner had not sought a speedy adjudication; that he had acquiesced in much of the delay by failing to object to adjournments; that the prosecutor had acted reasonably in attempting to obtain petitioner from the federal authorities; and that time required to answer and decide petitioner's motions for discovery and dismissal should be excluded from the speedy trial time limitations. Respondent's Brief, at 50-51.

On July 16, 1974, petitioner filed his third motion to dismiss, returnable July 26, 1974, this time alleging a violation of the Interstate Agreement on Detainers. Petitioner's Memorandum of Law, at 7; Respondent's Brief, at 51. On the return date, the court adjourned the motion, over petitioner's objection, to August 1, 1974, since the prosecutor assigned to the case was on vacation and had not filed a response. Transcript of Proceedings, at 2-3, People v. Foran, No. 6387/72 (N.Y. County Sup. Ct. July 26, 1974) (Culkin, J.). On August 1, 1974, the prosecutor had not yet returned from vacation and the court granted an adjournment to August 8, 1974 for the prosecutor to

serve his responding papers. Transcript of Proceedings, at 4-7, People v. Foran, No. 6387/72 (N.Y. County Sup. Ct. August 1, 1974) (Melia, J.). On August 5, 1974, the prosecutor appeared and announced that he had just returned from a three-week vacation but, subject to the decision on the motion, the People were ready for trial. Transcript of Proceedings, at 2-6, People v. Foran, No. 6387/72 (N.Y. County Sup. Ct. August 5, 1974) (Melia, J.). On August 8, 1974, the prosecutor filed his opposing papers and Justice Melia heard argument on the motion. Following the argument, the court denied the motion from the bench. Justice Melia observed that under the Interstate Agreement on Detainers, the court was empowered to "grant any necessary or reasonable continuance." N.Y. Crim. Proc. Law §580.20 (Art. IV(c)) (McKinney 1971). The court found that the continuances granted during the time the prosecutor was engaged in another trial were necessary and reasonable and that the District Attorney should not have been required to assign another assistant to the case. Further, the court found that the time during which the codefendant's discovery motion was pending (May 3, 1974 to May 30, 1974) was a necessary and reasonable continuance and did not warrant a severance of petitioner's trial; that the adjournments granted because of the unavailability of prosecution witnesses were necessary and reasonable; and that the adjournments granted because of the prosecutor's vacation were necessary and reasonable. The court, therefore, found that the Interstate Agreement on Detainers had not been violated and, accordingly, denied the motion to dismiss. Transcript of Proceedings, at 27-29, People v. Foran, No. 6387/72 (N.Y. County Sup. Ct. August 8, 1974). Thereupon, counsel for a codefendant represented to the court that he was scheduled to commence a trial of a nineteen-count federal indictment, in the United States District Court for the Southern District of New York, on August 20, 1974. He further stated that the defendants and witnesses in that case were travelling to the trial from Florida and that he expected the trial would consume more than thirteen actual trial days. For these

reasons, counsel for petitioner's codefendant requested an adjournment until the conclusion of the federal trial. The court, noting the possibility of prejudice to petitioner and the other codefendant, denied the application and marked petitioner's case ready for trial. Transcript of Proceedings, at 30-36, People v. Foran, No. 6387/72 (N.Y. County Sup. Ct. August 8, 1974).

Shortly thereafter, petitioner and his two codefendants moved for a hearing on their motions to suppress certain physical evidence and statements. Justice Birns presided over the three-day suppression hearing, discussed earlier. Transcript of Proceedings, People v. Mooney, No. 6387/72 (N.Y. County Sup. Ct. August 12-14, 1974). On September 3, 1974, the motion to suppress was denied. In an affidavit dated September 16, 1974, counsel for one of petitioner's codefendants informed the court that he was engaged in a trial in federal court and asked that the case be adjourned. Respondent's Brief, at 52.

On October 16, 1974, petitioner filed his fourth motion to dismiss the indictment, this one alleging a failure to prosecute. Petitioner's trial commenced the following day, October 17, 1974. The court reserved decision on petitioner's pending motion, Tr. 37-39, and denied it at the conclusion of the trial. Tr. 1417.

Petitioner now comes to this Court seeking a writ of habeas corpus on the ground that the pretrial delays in state court denied him his sixth amendment right to a speedy trial. The Supreme Court has identified four factors that a court should consider in passing on such claims: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530 (1972). In the instant case, the total delay between arrest and trial was less than twenty-five months. The time between arraignment on the indictment and commencement of the trial was eighteen months. The Court does not find these delays to be presumptively

prejudicial. *See* United States v. Tanu, No. 78-1255 (2d Cir. Nov. 17, 1978) (federal trial commenced more than four years after arrest, and more than twenty months after dismissal of state indictment for the same transaction, did not violate sixth amendment).

As to the reason for the delay, the Court finds no evidence of "[a] deliberate attempt to delay the trial in order to hamper the defense," Barker v. Wingo, *supra*, at 531, on the part of the state court prosecutor. Rather, the delay is attributable to time required to decide petitioner's pretrial motions, the difficulty in securing petitioner's presence from federal authorities, actions of petitioner's codefendants, the prosecutor's engagement in another criminal trial, and the prosecutor's summer vacation.

Although petitioner maintains that he sought a speedy adjudication of the state court charges as early as September 1973, Justice Culkin found otherwise. In this regard, the Court notes that petitioner's first motion to dismiss for failure to afford him a speedy trial was not made until June 13, 1974, some twenty-two months after his arrest. The prosecutor answered ready for trial on August 5, less than two months later, and the trial actually commenced on October 17, 1974.

Finally, in his submission to this Court, petitioner makes no claim whatsoever of any prejudice occasioned by the delay. At his state court trial petitioner called no witnesses. Moreover, petitioner was continued on bail following his arraignment on the indictment. Although he was in state custody from March 20, 1974, this was a result of his federal sentence and not the state court indictment.

Upon consideration of the record of petitioner's state court trial, the Court finds no basis for invalidating petitioner's conviction and sentence on sixth amendment grounds.

Interstate Agreement on Detainers

The threshold issue, with regard to petitioner's claim based on the Interstate Agreement on Detainers, concerns the appropriate scope of review. The United States Court of Appeals fro the Second Circuit has held that a violation of the Interstate Agreement on Detainers, is not a basis for habeas corpus relief under 28 U.S.C. §2255. Edwards v. United States, 564 F.2d 652 (1977); *see* Williams v. Maryland, 445 F. Supp. 1216, 1220 (D. Md. 1978). And since "there can be no doubt that the grounds for relief under §2255 are equivalent to those encompassed by §2254, the general federal habeas corpus statute," Davis v. United States, 417 U.S. 333, 344 (1974), there is no reason for a different result under section 2254. On the other hand, the United States Court of Appeals for the Seventh Circuit has held that

> an allegation of a state prisoner, that he has been denied rights under the [Interstate Agreement on Detainers], is an allegation that he is in custody in violation of a law of the United States, and the requirement for federal habeas corpus jurisdiction under 28 U.S.C. §2254(a) is met.

Echevarria v. Bell, 579 F.2d 1022, 1025 (1978) (footnote omitted). The United States Court of Appeals for the Sixth Circuit, taking yet another approach, has implied that something more than a bare violation of the time limitations of the Interstate Agreement on Detainers would have to be shown before a federal habeas corpus court could invalidate a state conviction. Stroble v. Egeler, 547 F.2d 339 (6th Cir. 1977) (per curiam). In *Stroble*, the court remanded the denial of a writ of habeas corpus for an evidentiary hearing to determine whether the continuances granted in the state court trial "were on the

basis of good cause shown after notification and with [petitioner] and counsel present." 547 F.2d at 341. The Sixth Circuit further instructed the district court that,

> [i]f there was a failure to observe one or more of these provisions, the court should then determine whether prejudice to the [petitioner] resulted therefrom, and if not, whether non-prejudicial violations of the [Interstate Agreement on Detainers] nonetheless mandates vitiation of the trial and sentence and dismissal of the indictment.

Id.

This Court is of the opinion that a violation of the time limitations, contained in Articles III(a) and IV(c) of the Interstate Agreement on Detainers, provides no independent basis for the grant of a writ of habeas corpus under 28 U.S.C. § 2254. Rather, such claims should be a factor to consider in determining whether a petitioner's sixth amendment speedy trial rights were violated. *See* Barker v. Wingo, 407 U.S. 514, 530 (1972). Nevertheless, the dismissal of petitioner's claims need not be based solely on that ground. Even upon construing this developing area of the law most favorably to the petitioner, and reviewing his claims de novo, the Court concludes that the time limitations of the Interstate Agreement on Detainers were not violated.

It is now clear that a writ of habeas corpus ad prosequendum is not a "detainer" for purposes of the Interstate Agreement on Detainers. People v. Squitieri, 91 Misc.2d 290, 397 N.Y.S.2d 888 (N.Y. County Sup. Ct. 1977); *cf.* United States v. Mauro, 436 U.S. 340 (1978). Accordingly, the time limitations of the Interstate Agreement on Detainers did not begin to run

until the bench warrant issued by Justice Martinis was lodged as a detainer against petitioner with the warden of the federal penitentiary in Lewisburg on January 24, 1974.

The 120-day limit of Article IV(c) of the Agreement, rather than the 180-day limit of Article III(a), is applicable here since the petitioner was actually produced in New York City on March 19, 1974, less than sixty days after the issuance of the bench warrant. Accordingly, if there had been no necessary or reasonable continuances, petitioner's trial should have begun by July 17, 1974. Since his trial did not commence until October 17, 1974, ninety-two days later, the question for the Court is whether the full ninety-two days can be attributed to necessary and reasonable continuances that were granted for good cause shown in open court, the petitioner or his counsel being present. *See* N.Y. Crim. Proc. Law § 580.20 (Art. IV(c)) (McKinney 1971).

Although the thirty days (March 21, 1974 to April 21, 1974) that the prosecutor was engaged in another criminal trial would be good cause for a continuance, nothing in the record suggests that the prosecutor sought a continuance on this basis. Accordingly, this period cannot be excluded from the time limitations of the Interstate Agreement on Detainers.

However, the twenty-eight days (May 3, 1974 to May 30, 1974) during which petitioner's codefendant's discovery motion was pending may be excluded. Petitioner had notice of the motion and made no objection to the delay it would engender.

The ten-day adjournment, granted to the prosecutor (June 14, 1974 to June 24, 1974) was based upon the unavailability of police witnesses and was granted in open court. From June 24, 1974 through September 3, 1974 (seventy-one days), petitioner's pre-trial motions were made and decided. Two motions sought dismissal of the indictment for denial of a speedy trial and the

third, made nearly two years after arrest, sought suppression of physical evidence. Thereafter, counsel for one of petitioner's codefendants sought adjournments because of other engagements.

Petitioner argues that the time required to decide his three motions to dismiss for delay should not be excluded from any computation of time limitations. The Court disagrees. Where a criminal defendant seeks an adjudication on an issue that would preclude a trial, he cannot thereafter argue that the time required to decide his claim should be held against the state for purposes of computing limitations of time. In the instant case, petitioner made three pretrial motions to dismiss the indictment, each alleging a delay in prosecution. The Court declines to hold that state courts must decide such motions immediately upon filing on pain of dismissal of the indictment for delay.

Petitioner also argues that the delay caused by the pretrial motions of one of his codefendants and by the engagement of counsel for the other codefendant should not be attributed to him. In further support of this argument he claims that his trial should have been severed from that of one of his codefendants "for substantive reasons." Petitioner's Memorandum of Law, at 33. However, petitioner made no claim regarding a severance in his brief to the Appellate Division nor did he press any conflict with his codefendants in the pretrial motions filed in the trial court. Accordingly, the Court rejects this argument as well.

Finally, petitioner points to the prosecutor's three-week summer vacation and argues that this was neither a necessary nor reasonable ground for continuance. Again the Court disagrees. As Justice Melia pointed out, in denying petitioner's third speedy trial motion, "[i]f the district attorney could not go on vacation because he had a case to try, he would never get one because he always has a case to try." Transcript of Proceedings, at 29, People v. Foran, No. 6387/72 (N.Y. County Sup. Ct.

August 8, 1974). Other judges, in the analagous context of the federal Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, agree that reasonable vacation periods for counsel should be excluded from the applicable time limitations. *See* Second Circuit Judicial Council Speedy Trial Coordinating Committee, Proposed Guidelines Under the Speedy Trial Act, at 38 (Nov. 20, 1978). Moreover, in the instant case, the prosecutor answered ready for trial on August 5, 1974, only nineteen days after the limitations of the Interstate Agreement on Detainers would have expired, had there been no continuances.

In sum, at least 109 days of delay are directly attributable to motion practice by petitioner and his codefendants, and the unavailability of police witnesses. Thus, the fact that petitioner's trial did not commence until ninety-two days after the otherwise applicable limitation of the Interstate Agreement on Detainers, does not make a violation of that statute.

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is denied. 28 U.S.C. § 2254.

SO ORDERED.

s/ John M. Cannella
JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
January 9, 1979.

FOOTNOTES

1/ Following the filing of the petition, the Court advised counsel for petitioner that it would require transcripts of the state court suppression hearing and other pretrial proceedings. After several unsuccessful attempts to obtain the transcripts, from counsel for the codefendants in the state court trial, petitioner's attorney subpoenaed the transcripts from the Clerk of the New York County Supreme Court. Thereafter, in August, 1978, the minutes were delivered to the Court.

2/ Transcript of Proceedings, at 1384, People v. Mooney, No. 6387/72 (N.Y. County Sup. Ct., Oct. 17 - Nov. 6, 1974). At the request of counsel for both parties, the various transcripts referred to have not been docketed as exhibits in order to avoid the expense of duplication. Upon the filing of this Decision the transcripts shall be returned to counsel, on condition that these be made available in any subsequent court proceedings [hereinafter, specific pages of the trial transcript will be cited as "Tr. —."].

3/ Tr. 1390-91. The trial court initially instructed the jury on the issue of reasonable doubt as follows:

> In all criminal cases including this one the Defendants are presumed to be innocent of the charges made against them. This presumption continues throughout the Trial, throughout the testimony, throughout summations and even during my instructions to you. It continues as a presumption unless and until you, by your verdict of guilty, have decided that the presumption has been overcome by the evidence or until you decide by your verdict of not guilty that the presumption has become an established

fact. The burden of overcoming the presumption is not on the Defendants but it is on the Prosecution.

In order for the Prosecution to overcome this presumption, the charges against the Defendants must be proved in a manner which we call beyond a reasonable doubt. A reasonable doubt is defined as an actual doubt you are conscious of after going over in your minds the entire case, giving consideration to all of the testimony and exhibits and to every part of the evidence. Guilt does not have to be established as a mathematical certainty in order to be established beyond a reasonable doubt.

Reasonable doubt is a doubt which arises from the evidence for some good reason. It is not merely a vague or imaginary doubt. It is not a mere whim, not a guess, not surmise, neither is a reasonable doubt a subterfuge to which a juror might resort in order to avoid doing a disagreeable duty.

If on a consideration of the entire case with all of the evidence, including the testimony and exhibits together with such inferences, such conclusions as fair minded and intelligent men and women have the right to draw from the facts which have been established from the evidence and which you believe, if you have such a belief in the Defendant's guilt of any offense charged against the Defendant, that a prudent and reasonable person would feel it safe to act on that belief on matters of the highest concern to himself, then you may safely say that the

> Prosecution's case with respect to that offense has been established beyond a reasonable doubt. However, if you have a reasonable doubt, as I have defined it, as to whether the Defendants' guilt has been satisfactorily shown as to any offense charged against that Defendant, then that Defendant is entitled to a verdict of not guilty as to that offense.

Tr. 1332-34. Following the exceptions, the judge supplemented his charge, in part, as follows:

> Ladies and gentlemen, if you do not find any fact beyond a reasonable doubt, then the Defendant is entitled to the benefit of that doubt. There are some facts you may find beyond a reasonable doubt and some you may not find beyond a reasonable doubt. If the facts that you find beyond a reasonable doubt lead to a conclusion of guilt, then that conclusion has been reached beyond a reasonable doubt. It is not necessary that every individual fact be proved beyond a reasonable doubt. But sufficient facts to establish the guilty of a Defendant beyond a reasonable doubt in the entire case must be proved.

Tr. 1395-96.

4/ In Rakas v. Illinois, 47 U.S.L.W. 4025 (U.S. Dec. 5, 1978), the Supreme Court held that an automobile passenger *qua* passenger has no legitimate expectation of privacy in the area under the seat of a car. Consequently, in that case, a warrantless seizure of incriminating evidence from this area did not violate the petitioners' fourth amendment rights. *Id.* at 4031.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1682

JOHN FORAN,

Petitioner,

against

HON. PAUL METZ, Superintendent of Great Meadows Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

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MEMORANDUM FOR RESPONDENT IN OPPOSITION

Questions Presented

1. Whether review should be denied of petitioner's speedy trial claim since the District Court denied leave to appeal it as "frivolous" and the Circuit Court did not review that claim?

2. Whether review should be denied of petitioner's Interstate Agreement on Detainers claim because it was raised in the courts below as a Sixth Amendment or Federal statutory claim and is raised here for the first time under the Fourteenth Amendment?

3. Whether review should be denied of petitioner's Interstate Agreement on Detainers claim since the decisions below were based on concurrent findings of fact by the District and Circuit Courts?

4. Whether review should be denied where petitioner, by introducing evidence on his Federal habeas corpus application that he failed to provide to the State appellate courts, failed to exhaust State remedies?

Statement of Facts

Petitioner was found guilty in Supreme Court, New York County, following a jury trial, of attempted murder and was sentenced on February 18, 1975, to an indefinite term of imprisonment of from seven to twenty-one years. His conviction was affirmed without an opinion by the Appellate Division, First Department, *People* v. *Foran,* 53 A D 2d 1065 (1976), and leave to appeal to the New York Court of Appeals was denied by an unpublished order without an opinion (Aug. 24, 1977).

At the time he prepared his petition for a writ of habeas corpus to the United States District Court for the Southern District of New York, he was imprisoned at Great Meadows Correctional Facility. By the time it was served, he had been tranferred to Auburn Correctional Facility. When argument was heard before the United States Court of Appeals for the Second Circuit, he was being detained at Green Haven Correctional Facility, where he remains at this time.

Petitioner's application to the District Court raised three claims, quoted in the decision of the District Court (4a).* The District Court rejected his allegation of error in the State court's jury instructions as to reasonable doubt (5a), and found his Fourth Amendment objections

* References to documents in Petitioner's Appendix to his Petition for Certiorari are indicated by the suffix "a".

to the introduction of evidence unreviewable by Federal habeas corpus proceedings (7a). It reviewed at length his Sixth Amendment claim that he was denied a speedy trial and rejected it (8a-13a).

On its own motion, the District Court also construed his speedy trial claim to include a separate claim of violation of Federal rights based on the Interstate Agreement on Detainers* (13a). It found, however, that a violation of the time limitation of the Interstate Agreement on Detainers (15a, 18a):

> "provides no independent basis for the grant of a writ of habeas corpus under 28 U.S.C. § 2254. Rather, such claims should be a factor to consider in determining whether a petitioner's sixth amendment speedy trial rights were violated. See *Barker* v. *Wingo,* 407 U.S. 514, 530 (1972). Nevertheless, the dismissal of petitioner's claims need not be based solely on that ground. Even construing this developing area of the law most favorably to petitioner, and reviewing his claims 'de novo', the Court concludes that the limitations of the Interstate Agreement on Detainers were not violated.
>
> ". . .
>
> "In sum, at least 109 days of delay are directly attributable to motion practice by petitioner and his codefendants, and the unavailability of police witnesses. Thus, the fact that petitioner's trial did not commence until ninety-two days after the otherwise applicable limitation of the Interstate Agreement on Detainers, does not make out a violation of that statute."

* In State court, petitioner raised this claim solely under "the Interstate Agreement on Detainers." The State courts and the District Attorney understood this as a claim under N.Y. Criminal Procedure Law § 580.20. Until the District Court on its own motion raised the issue, no party or court had intimated that the Federal statute by which the United States became party to the Agreement, Pub.L. 91-538, 84 Stat. 1397, might in any way be involved in petitioner's case.

In making his speedy trial claim in the District Court, petitioner quoted extensively from minutes of pre-trial proceedings (Petition for a Writ of Habeas Corpus, at 6-13). He had made similar references to those minutes on his State appeal without providing them to the District Attorney or the State appellate courts, although it was his duty to do so if he had wanted them to be considered. (District Attorney's Brief, *People* v. *Foran* (1st Dept.), at 44-45, included as Exh. "C" to Respondent's Opposition to the Petition for Writ of Habeas Corpus, Affidavit of Robert J. Schack, Assistant Attorney General, sworn to March 16, 1978, para. "3", *Foran* v. *Metz* (S.D.N.Y.)). Respondent argued that petitioner's failure to provide those minutes to the State appellate courts deprived the State of a full and fair opportunity to consider the merits of the claim being presented to the District Court and constituted a failure to exhaust State remedies (Schack affidavit, *supra*, para. "3"; Respondent's Memorandum of Law in Opposition to Petition for Writ of Habeas Corpus, March 17, 1978, Point III, *Foran* v. *Metz* (S.D.N.Y.)). In reply, petitioner argued that the State courts could have sent for the minutes if they wanted and that the State was estopped from objecting on exhaustion grounds since the District Attorney had answered petitioner's speedy trial claim on the appeal. (Relator's Reply Memorandum of Law [April 1978], pp. 6-7, *Foran* v. *Metz* (S.D.N.Y.)).

The District Court did not rule on respondent's exhaustion argument. It required petitioner's attorney to produce the pre-trial hearing minutes (19a) and proceeded to rely on them heavily in its decision (10a-12a, 17a-18a).*

* Petitioner apparently did not fully comply with this order. When counsel was asked at oral argument before the Circuit Court if he had moved for a severance, he said he believed he had. Later that day he for the first time served respondent and the Circuit Court with minutes of his motion.

Petitioner applied for a certificate of probable cause as to all of his claims. The District Court found that appeal "would be frivolous" as to its decision on petitioner's jury instruction, Fourth Amendment and Sixth Amendment claims. It issued a certificate on the question of "a claimed violation of the Interstate Agreement on Detainers" (Certificate, January 29, 1979).

The Court of Appeals did not rule on respondent's exhaustion argument. It affirmed on the District Court's opinion "to the extent that it found no violation of the Interstate Agreement on Detainers" (2a). It did not rule on the speedy trial claim petitioner had attempted to raise in that Court.

The facts as to the crime and petitioner's trial are set forth at length in the decision of the District Court (6a, 8a-13a, 16a-18a) and are adopted by respondent on this opposition to the petition for a writ of certiorari.

POINT I

Review should be denied of petitioner's speedy trial claim since the District Court denied leave to appeal it as "frivolous" and the Circuit Court did not review that claim.

In denying petitioner relief on his speedy trial claim, the District Court made a detailed review of the record, finding that the delay was not excessive, was not due to improper prosecutorial actions, was largely due to petitioner's own delay in asserting his claim and was not prejudicial to his defense (12a-13a). It explicitly denied as "frivolous" his request to appeal the speedy trial issue (Certificate of Probable Cause, at 1, January 29, 1979), and granted the certificate solely on "a claimed violation of the Interstate Agreement on Detainers" (*id.*, at 2).

Petitioner did not seek a further certificate of probable cause from the Court of Appeals on his speedy trial claim. He nonetheless sought to raise it on that appeal. The Circuit Court did not rule on it (2a).

Review should be denied of petitioner's speedy trial claim because the District Court found it "frivolous" in denying the probable cause certificate. The District Court thus found that the claim did not present a question deserving appellate review. See *Alexander* v. *Harris*, —— F. 2d ——, August Term, 1978, No. 509, slip op. 1531, 1537 & cases cited (2d Cir. March 1, 1979); Blackmun, "Allowance of In Forma Pauperis Appeal in Section 2255 and Habeas Corpus Cases", 43 FRD 343, 351-3 (1967).

Moreover, this Court has regularly declined, on appeal and by certiorari, in habeas corpus and other types of cases, to review claims that were not passed on by the Courts below. See, e.g., *Ramsey* v. *United Mine Workers of America*, 401 U.S. 302, 312 (1971); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 157 n. 16 (1970); *Federal Trade Comm'n.* v. *Simplicity Patterns Co.*, 360 U.S. 55, 61 n. 4 (1959); *Darr* v. *Burford*, 339 U.S. 200, 203 (1950). Since petitioner's speedy trial claim was not considered by the Circuit Court,* it is not suitable for review here.

* Moreover, as noted (*supra* at 4), petitioner even produced in Circuit Court facts about his State trial he had not provided the District Court. The case is thus improperly before this Court on a record including evidence not reviewed by the District Court.

POINT II

Review should be denied of petitioner's Interstate Agreement on Detainers claim because it was raised in the Courts below as a Sixth Amendment or Federal statutory claim and is raised herein for the first time under the Fourteenth Amendment.

As noted (*supra* at 3), petitioner originally raised his Interstate Agreement on Detainers claim as part of his Sixth Amendment speedy trial claim. The District Court, on its own motion, considered it as a Federal statutory claim (13a). The Circuit Court reviewed it on the latter basis (2a).

For the first time in his Petition for Certiorari (at 14), petitioner characterizes his claim as arising under the Fourteenth Amendment. It was not reviewed as such by the Courts below. The claim is, therefore, not suitable for review by this Court. See Point I, *supra*.

POINT III

Review should be denied of petitioner's Interstate Agreement on Detainers claim because the decisions below were based on concurrent findings of fact by the District and Circuit Courts.

As noted (*supra* at 3), the District Court gave two reasons for denying petitioner's claim of a violation of the Interstate Agreement on Detainers. First, while it noted that some courts have found that such an allegation if made out would be a ground for Federal habeas corpus relief from a State criminal conviction, it held on its own review of decisions by this Court and the Second Circuit that such an allegation does not provide an independent basis for habeas corpus jurisdiction (15a). As a second independent and sufficient reason, it concluded after a detailed review of the facts (16a-18a) that there was no

violation of the Agreement's time limitations (18a). On appeal, the Circuit Court explicitly affirmed the factual finding that there was no violation (2a).

This Court has noted:

> "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Moreover, this Court has held that it

> "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Accord, *United States* v. *Ceccolini*, 435 U.S. 268, 273 (1978); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

Petitioner does not dispute the findings of the courts below as to the facts. Instead, he argues that as a matter of law the District and Circuit Courts were wrong in holding that the continuances granted in his case were necessary or reasonable.

First, he argues that the time taken to decide a discovery motion by one of his co-defendants should not be counted against him since petitioner had won an identical motion and the State should simply have consented to his co-defendant's motion (Petition for Certiorari, at 20). Since petitioner did not put these motions into his appendix before the Circuit Court below or in his present papers, he should not be allowed to rely on them here. See Points I, II *supra*. Assuming *arguendo* that the motions were identical, petitioner has not shown why the trial court or the District Attorney should have known the motions were the same or why the court and District Attorney were not entitled to enough time to determine if different considerations were relevant to discovery in

his co-defendant's case from his. Most importantly, as the District Court noted (16a), he "had notice of [his co-defendant's] motion and made no objection to the delay it would engender."

Second, petitioner objects to the exclusion of the time to decide his many motions to dismiss the indictment for denial of a speedy trial and for violation of the Interstate Agreement on Detainers (Petition for Certiorari, at 20). As the District Court held (17a):

> "Where a criminal defendant seeks an adjudication on an issue that would preclude a trial, he cannot thereafter argue that the time required to decide his claim should be held against the state for purposes of computing limitations of time . . . The Court declines to hold that state courts must decide such motions immediately upon filing on pain of dismissal of the indictment for delay."

Finally, petitioner argues that the adjournments due to engagements of counsel for one of his co-defendants should not be counted against him (Petition for Certiorari, at 21). As the District Court noted, however, this claim comes too late since "petitioner made no claim regarding a severance in his brief to the Appellate Division nor did he press any conflict with his codefendants in the pretrial motions filed in the trial court" (17a).*

In summing up, the District Court pointed out that (18a):

> "at least 109 days of delay are directly attributable to motion practice by petitioner and his codefendants, and the unavailability of police witnesses."

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* As noted (*supra* at 4) petitioner only served the minutes containing his severance motion following oral argument before the Circuit Court. Even if the District Court was unaware of that motion, which should preclude its consideration here (Point I, *supra*), that Court correctly noted that petitioner did not assert it on his State appeal.

With those days excluded, petitioner's trial came within the Interstate Agreement on Detainers' time limitation of 120 days plus necessary and reasonable continuances from the lodging of the warrant. The Circuit Court explicitly affirmed on that basis.

Considered as factual findings, those holdings clearly come within this Court's "two court rule". Considered as mixed questions of law and fact, those holdings were clearly correct. In either case, review of the holdings should be denied.

POINT IV

Review should be denied because petitioner, by introducing evidence he had failed to provide to the State appellate courts, failed to exhaust State remedies.

Petitioner had indigent defendant status in the State courts. He could have requested a free transcript of the minutes of the pre-trial adjournments and hearings on the motions to dismiss. N.Y. Judiciary Law § 302. It was his duty to provide those minutes to the State courts if he wanted them considered on his appeal. 22A NYCRR §§ 600.10(b)(1)(iii), (d)(2)(iii). He did not do so.

For the first time in Federal court, petitioner produced the pre-trial minutes. While respondent believes that the District and Circuit Courts properly rejected petitioner's claims based on the new facts he presented therein, it is submitted that they erred in not considering respondent's argument that petitioner failed to exhaust his State remedies. By going outside the facts presented to the State appellate courts, petitioner deprived the State courts of a full and fair opportunity to consider the merits of his claims. *Stone* v. *Powell*, 428 U.S. 465, 495 (1976); *Pulver* v. *Cunningham*, 562 F. 2d 198, 201 (2d Cir. 1977).

In so noting, respondent does not seek certiorari on the exhaustion issue, but urges it as an initial reason certiorari should be denied on petitioner's claims. Assuming *arguendo* there were any merit in petitioner's claims, this Court would still not allow Federal habeas corpus relief on them since he did not first present them to the State courts.

As noted (*supra* at 4), petitioner made references on his State appeal to the pre-trial proceedings without providing the minutes to the courts. The District Attorney had argued that he was unable to respond adequately without the transcripts. In answering the petition herein, respondent was forced to conjecture, based on a documentary record instead of contemporaneous recollection, as to what the District Attorney with his intimate knowledge of the case would have argued had these claims been made on a proper record in State court. The State has been severely prejudiced as a result. Since the State appellate courts were deprived both of the facts on which the District and Circuit Courts and petitioner relied, as well as of the response of the District Attorney, it must be held that the Federal courts were not presented the same claims raised in the State appellate proceedings.

This Court has held that reasons of comity and finality in criminal litigation require a defendant to show both "cause" and "prejudice" for a procedural default in State trial court in order to raise the issue on a petition for Federal habeas corpus relief. *Wainwright* v. *Sykes*, 433 US 72, 88-91 (1977). While petitioner was arguably prejudiced by his failure to introduce the pre-trial minutes on his State appeal, his reasons for not doing so (that the State courts should have sent for the minutes and that the District Attorney's attempt to answer his speedy trial claim without the minutes somehow estops respondent from arguing failure to exhaust State remedies, *supra* at 4) are not legally sufficient cause for that failure to be excused

by a Federal court. See *Salter* v. *Johnston,* 579 F. 2d 1007, 1008 (6th Cir.), cert. den. —— U.S. ——, 99 S. Ct. 587 (1978).

"[C]onsiderations of comity and concerns for the orderly administration of criminal justice," *Francis* v. *Henderson,* 425 US 536, 539 (1976), have repeatedly led the Federal courts to dismiss for failure to exhaust State remedies where the petitioner presents a different factual basis than he argued in State court. See, e.g., *United States ex rel. Figueroa* v. *McMann,* 411 F. 2d 915, 916 (2d Cir. 1969); *Camara* v. *Bombard,* 455 F. Supp. 176, 178 (S.D.N.Y. 1978); *United States* v. *Fay,* 232 F. Supp. 139, 142 (S.D.N.Y. 1964).

In a case on all fours with this, *United States ex rel. Boodie* v. *Herold,* 349 F. 2d 372, 373-4 (2d Cir. 1965), cited in *Picard* v. *Connor,* 404 U.S. 270, 276 (1971), the United States Court of Appeals for the Second Circuit held that the failure of a New York defendant to provide the State appellate courts with the minutes of his arraignment deprived them of an "opportunity to pass upon the alleged denial of counsel in light of a ful record . . . The doctrine of 'exhaustion of state remedies' requires that the federal court refrain from acting until the state courts have been given that opportunity." It specifically found that the transcript could not be accepted for the first time by a Federal court before "an effort has been made to bring these facts to the attention of the state court," *id.,* 349 F. 2d at 373 n.1.

The Ninth Circuit in *Schiers* v. *California,* 333 F. 2d 173, 178 (9th Cir. 1964), also cited in *Picard* v. *Connor, supra,* 404 U.S. at 276, likewise found that State remedies had not been exhausted where the petitioner sought to introduce in Federal Court a transcript that had not been before his State's appellate courts.

Petitioner's claims herein were presented to the State appellate courts on a different record than here. He,

therefore, failed to exhaust effective, available State remedies and may not obtain relief on these claims pursuant to 28 U.S.C. § 2254. *Picard* v. *Connor, supra; Wilson* v. *Fogg,* 571 F. 2d 91, 92 (2d Cir. 1978). See also *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
June 8, 1979

Respectfully submitted,

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